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IN THE

Supreme Court of the United States

October Term, 1957

No. 266

HUMBLE OIL & REFINING COMPANY, *Petitioner*

v.

EDWIN K. ATWOOD, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

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IN THE

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No._____

HUMBLE OIL & REFINING COMPANY, *Petitioner*

v.

EDWIN K. ATWOOD, ET AL., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI

Humble Oil & Refining Company, a Texas corporation, prays for the issuance of this Court's Writ of Certiorari to review the judgment of the United States Court of Appeals, Fifth Circuit entered on May 17, 1957, in that certain cause, styled and numbered on the docket of said Court as follows: *Edwin K. Atwood, et al. v. Humble Oil & Refining Company*, No. 15918.

Opinion Below

The opinion in the Court below has been neither officially nor unofficially reported. The only opinion filed in the case is set forth at page 211 of the Certified Record, and appears at page 17 of this Petition as Appendix "A".

Jurisdiction of This Court

The judgment of the Court of Appeals, which Petitioner seeks to have reviewed (R. 220) is dated May 17, 1957, and was entered on the same date. Copy of such judgment appears at page 220 of the Certified Record and at page 26 this Petition, as Appendix "B". No motion for rehearing was filed; and there has been no application for nor extension of time within which to petition for certiorari. This Court has jurisdiction to review the judgment or decree in question by writ of certiorari under the provisions of 28 U.S.C.A. 1254(1), C646, 62 U. S. Stat. 928, June 25, 1948. The question presented is within the considerations envisioned by Rule 19(b) of this Court, for the judgment of the Court of Appeals has the effect of nullifying the intent and purport of Rules 8(e)(1) and 41(b), Federal Rules of Civil Procedure, promulgated by this Court.

The Question Presented For Review

Did the Court of Appeals err in its holding that the Trial Judge was without power under Rule 8(a) and (e)(1), *Federal Rules of Civil Procedure*, to order a repleader, unless the complaint was so prolix, verbose and repetitious as to require peremptory and final dismissal of the suit?

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 8. General Rules of Pleading.

(a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim,

crosselaim, or third-party claim, shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and * * *.

(e) Pleading To Be Concise And Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. * * *

Rule 41. Dismissal of Actions.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. (28 U.S.C.A. following Section 723C).

LOCAL RULE 22 FOR THE DISTRICT COURTS OF THE SOUTHERN DISTRICT OF TEXAS

Rule 22. Disposal of Cases Without Trial.

In these instances, and in instances provided by law or Court Rules, the Court may, with or without notice to the parties, dismiss any case other than a criminal case for want of prosecution:

(a) When plaintiff shall in any case for more than sixty (60) days after filing suit * * * willfully fail or refuse to make ready the case, or cause same to be made ready, to be placed on the Trial Calendar. (R. 201).

Statement of the Case

Federal Jurisdiction in the Court of first instance was based upon averments of diversity of citizenship with the amount in controversy exceeding $3,000.00. (R. 10).

The original complaint (R. 9 to 121) contains 112 pages of printed matter—45 pages in the complaint proper, and 67 pages of exhibits. The complaint contains 63 adoptions by reference which results in the necessity of reading 544 pages under circumstances far more tedious than reading 544 consecutive pages, before the complexities of the suit can be understood and resolved. With this in mind the trial judge called a pre-trial conference which was held in chambers on May 6, 1955 (R. 157), 163, 200), at which time he ordered complainants (Respondents here) to replead by August 1, 1955, in conformity with the provisions of Rule 8(a) and (e)(1), *Federal Rules of Civil Procedure*, by filing a pleading "setting out a short and plain statement of the claims which they assert and the relief by them demanded." (R. 200). The time within which complainants were to comply with the Court's order to replead was extended, at complainants' request, until August 15, 1955 (R. 159). Upon complainants' failure to replead by that date, as directed, without offering any excuse for such failure or requesting any additional time, the trial judge, on his own motion, extended the time until September 6, 1955, inviting a motion to dismiss if repleader was not filed by that time (R. 161, 200).

Prior to this new date for filing the repleader, at complainants' request, a second pre-trial conference was held. (R. 161). At this conference complainants were directed to state *orally* the substance of their complaint and the relief demanded. (R. 163). From this *oral* statement the

trial judge was able, for the first time to untangle the intricate web of contingent relief, cross-references, bills of discovery, counts and paragraphs contained in the 112 page complaint and from such *oral* statement was able to summarize the complainants' claims in four and one-half pages of a proposed pre-trial order which, because of objections from complainants, was never entered. (R. 163).

Though able to comprehend the substance of complainants' claims, from this oral exposition, the trial judge, in order that the cause might proceed in orderly fashion and with intelligible written pleadings, adhered to his previous order to replead and extended the time for filing such repleader to September 15, 1955. (R. 168).

On September 15, 1955, complainants, instead of repleading, filed an "amendment", setting up three additional counts, adding four additional paragraphs to the already verbose and prolix complaint. Complainants now had a complaint of 116 pages instead of the original 112.

Holding that this amendment "did not comply either with the letter or spirit" of his order to replead (R. 187), the trial judge again extended the time within which the order of May 6, 1955, might be complied with. This last extension was to November 7, 1955; but, the trial judge this time warned complainants that "no further extensions will be granted". (R. 195).

November 7 arrived, and complainants again ignored the trial judge and his orders with the same contemptuous silence as though the Congress had, in the interim, abolished his Court.

The trial judge was then in a position where he must, of necessity, take some punitive action in order to preserve

the dignity and respect due his Court and the orders issuing therefrom. The sanctions prescribed by Rule 41(b), *Federal Rules of Civil Procedure*, seemed to have been precisely the sanctions contemplated and promulgated by this Court to meet this exact situation. He took such action by dismissing the complainants' suit. (R. 199). In doing so, he acted also under a local rule of Court which provides for dismissal in the event a complainant fails to make ready his case for trial. (R. 200; 201). Since the order of dismissal did not "otherwise specify", the dismissal, as contemplated by the Rule, operated as an adjudication upon the merits.

The Court of Appeals reversed upon the ground that this is not a case where "mere prolixity and repetition" justifies "final dismissal" of the complaint.

Argument

The writ should be granted for the reason that, the Court of Appeals in reversing the judgment of the Trial Court has nullified both the intent and purport of Rules 8(a) and (e)(1) and 41(b), *Federal Rules of Civil Procedure*, promulgated by this Court for the governance of the District Courts.

It is abundantly clear that the Court of Appeals labors under the misapprehension that the trial court dismissed the suit solely because of the prolixity and redundancy of the complaint, for, in footnote 1, to the opinion, the court states: "The docket entries of the trial judge along with the whole course of the trial show, however, that the *sole dereliction* charged against plaintiffs was *non-observance* of Rule 8 * * *." (R. 215; Appendix

page 21, this Petition). And this view is epitomized in the next to the concluding sentence of the opinion: "There may be cases in which mere verbosity or repetition would justify final dismissal by a trial court, but this is not in our opinion such a case.[1] (Op. R. 219; Appendix "A", this Petition). No one, not even the trial judge, has ever said or contended that this *is* such a case, for the "non-observance of Rule 8" merely prompted the court's order to replead; but it was the continued, relentless and defiant refusal of complainants to comply with this order of the court (or to offer some reasonable explanation for their refusal to do so) which prompted the order of dismissal.

Stated a little differently, the dereliction on complainants' part which visited upon them the penalties or sanctions provided for in Rule 41(b) was *not* the "mere" verbosity, prolixity and redundancy of their original complaint, which the trial judge sought, through judicial processes, to have them correct; but, rather, it was complainants' continued, defiant, unrelenting and contemptuous attitude in utterly ignoring the trial judge and his order to replead which prompted the entry of the trial court's order of dismissal against which this appeal was taken.

That the trial judge correctly ordered a repleader, is tacitly admitted by the Court of Appeals, for it is patent from the opinion filed that the offensive pleading was not susceptible to intelligent analysis from within its four corners. Oral or written amplification was, admittedly

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[1] The Court of Appeals, apparently, does not look with as much disfavor on verbosity and repetition as this Court did when adopting Rule 8, for a reference to **"mere** verbosity or repetition" that is, **"nothing more than** verbosity or repetition" indicates a rather soft and conciliatory attitude and view toward such an infraction of the Rules. (Webster's New International Dictionary, 2nd Ed.).

necessary for an intelligent grasp of its needless complexities. This the Court of Appeals says in effect, for, in reaching its conclusions in the determination of the questions before it, it does not say that the pleadings are "plausible" on their face, or that they were characterized by the simplicity and directness contemplated by the Rules, but rather that "the *brief* before us sets out and explains plausibly the contents and purposes of each count and paragraph, together with the relationship thereto of the attached exhibits." (R. 213); Appendix page 19 this Petition). And necessity for the *oral* explanation to the trial judge of the objects and purposes of the suit—not determinable from the face of the pleadings standing alone—is recognized by the Court of Appeals when it says:

> "In this proposed order (the pre-trial order of September 1, 1955), the Court reduced to seven and defined the categories of relief it conceived plaintiffs to be seeking, based upon the complaint AND ORAL STATEMENTS MADE BY THE ATTORNEYS." (R. 213; Appendix page 19, this Petition)[2]

Granting that the pleadings were such as to require *oral* explanation to the trial judge and *written* explanation to the Court of Appeals by way of appellate brief, it would seem quite obvious that the offensive pleadings were not of such simplicity, conciseness or directness as to reasonably comply with the requirements of Rule 8. If the Rule, therefore, was designed by this Court to do anything other than consume printing paper and printer's ink, the trial judge was authorized—nay, required to order a repleader in conformity with the provisions of the Rule. Having so ordered, he must, in the very nature of

[2] Emphasis supplied throughout, unless otherwise noted.

judicial power, have the means, by the application of appropriate sanctions, to enforce the order so made. This Court had supplied that power of enforcement through adoption of Rule 41(b), which the trial judge duly invoked.

The order of dismissal was grounded, not upon the initial verbosity, prolixity and repetitiousness of the original complaint; but rather upon the obdurate and contemptuous attitude of complainants in utterly ignoring the trial judge and his orders, all made and entered in the course of orderly judicial proceedings.

While there can be no room for doubt from a reading of the opinion that the Court of Appeals was moved by such considerations, the severity of the penalty or sanction resulting from the order of dismissal can have no probative value in testing the propriety of the order itself, for Respondents, in their brief before the Court of Appeals, sought to justify their dereliction in refusing to replead by stating that they had "elected to stand upon their complaint".[3] (Appellant's Br. P. 5). Had the order been one of dismissal *with leave to amend* and had complainants in the face of such an order "elected to stand upon their complaint", refusing to amend, it is inconceivable that they then would complain about the severity of an order which carried the sanction of the present one, or that the Court of Appeals would sustain them in their complaint. The futility of a lesser penalty or sanction is thus made clear for they would not have amended had a lesser sanc-

[3] This explanation was offered by Respondents for the first time in their brief before the Court of Appeals. Before the trial judge, however, Respondents merely stood mute, and in stony silence ignored the order to replead.

tion been invoked. The situation in which they found themselves, therefore, was one of their own making and not one of the court's choosing.

This leniency with which the Court of Appeals views an infraction of Rule 8 with regard to conciseness, simplicity and directness is emphasized by its statement that "brevity" is merely a "desirable" attribute of a pleading (Opinion R. 216). It will no doubt come as a shock to the trial branch of the judiciary and constitute the basis of considerable frustration to learn that, as construed by the Court of Appeals in this case, the provisions of Rule 8 are *directory* only and not *mandatory* as they have previously been conceived to be.

It seems also that the Court of Appeals ascribes the same innocuous meaning to the Local Rules of the trial court as it does to the Federal Rules of Procedure prescribed by this court, for, as already noted, by footnote 1 to its opinion (R. 215), the Court of Appeals dismisses consideration of the impact of Local Rule 22 dealing with peremptory dismissal for willful failure or refusal to make ready a case for trial with the same nonchalance as it deals with Rules 8 and 41(b). Yet, a review of the decisions of both this court and other courts of appeal show that local rules where in aid of and supplementary to the general rules are given the same force and effect as statutory law. *Hicks v. Bekins Moving & Storage Co.*, 1940, 9 Cir. 115 F. 2d 406; *Galveston Dry Dock Construction Co. v. Standard Dredging Co.*, 1930, 2 Cir., 40 F. 2d 442, 444; *Washington-Southern Navigation Co. v. Balt. & Phil. Steamboat Co.*, 1923, 263 U.S. 629, 44 S. Ct. 220, 68 L. Ed. 480.

Were this a case, as suggested by the Court of Appeals, where "final dismissal" by the trial court was not justified because of "mere verbosity or repetition" in the pleadings, the reversal of the trial court's action by the Court of Appeals would do no violence to the applicable Rules of Civil Procedure adopted by this Court. Since, however, the dismissal was grounded upon the complainants' abject refusal to respect and to comply with an order of the trial judge duly made in the course of orderly judicial proceedings, the judgment of the Court of Appeals emasculates Rule 8 as well as the power of the trial judge, as provided for in Rule 41, to control proceedings in his court when faced with a defiant and obstreperous advocate.

The opinion of the Court of Appeals is not one that can be simply ignored, for its implications will have a serious impact upon the future application of the pertinent Rules of Procedure in other District Courts. Future attempts by trial judges to impose sanctions for refusal to obey orders duly entered will be seriously impaired unless the judgment of the Court of Appeals is reviewed and unless its determination of the issues involved is corrected by this Court, for a fair analysis of the Court of Appeals' opinion inevitably leaves one stunned by two appalling conclusions: (1) That a trial judge is without power, under Rule 8, to order a repleader unless the offensive pleadings are so verbose, prolix and repetitious as to require peremptory and final dismissal, and (2) if repleader is ordered because a pleading does, in fact, violate the "simple, concise and direct" provisions of Rule 8, the sanctions of Rule 41 cannot be imposed even though the of-

fending party refuses to comply with the Court's order, *unless* the original pleading is in such flagrant violation of the Rule as to require peremptory and final dismissal of the complaint. The vice of this holding lies in the fact that, for all practical intents and purposes, it virtually prohibits the entry of an order to replead, so long as a complaint states a cause of action—regardless of how ineptly it may be drawn and regardless of its viciousness in violating the "simple, concise and direct" requirements of the Rule.

It was, in fact, this erroneous conception of the question presented by the appeal of this case and the argument of the Respondents based thereon which led the Court of Appeals into error, for we note the following point or proposition urged in Respondents' brief before that Court:

> "THE ORDER OF DISMISSAL SHOULD BE REVERSED BECAUSE IT DOES NOT APPEAR TO A CERTAINTY THAT PLAINTIFFS ARE NOT ENTITLED TO ANY RELIEF." (Appellants' Br. P. 9).

And, apparently, it was a sympathetic view toward this argument that prompted the Court of Appeals to reverse the order of dismissal upon the ground that the case is not one which would "justify final dismissal" for "mere verbosity and repetition" (R. 219)—although, significantly, the Court did not advert to, discuss or pass upon the *real* ground upon which the trial court bottomed its order of dismissal: The willful and intransigent refusal of the complainants to abide by and comply with the trial court's order to replead in conformity to the requirements of

Rule 8, or, alternatively, to proffer an extenuating reason, excuse or ground for standing silent and adamant in such refusal.

If, perchance, the Court of Appeals actually meant that the trial court was not justified in ordering a repleader for "*mere* verbosity or repetition", then the error of that Court is compounded, for it must be assumed that this Court did not lightly draw or superficially consider these Rules or ignore the import and implications involved when promulgating them for the governance of the District Courts. By their adoption it was certainly contemplated that they would govern trial procedure, and if followed by the trial judge, that his action in doing so would, on appeal, be upheld.

We also question the rationale of the Court of Appeals regarding two other rather novel and unorthodox suggestions: (1) That the trial court could have (and, presumably *should have*) corrected the redundancy of complainants' pleading by striking *portions* of the complaint (Opinion R. 217), or, (2) Alternatively, that the trial court could have eliminated the necessity for *any* pleadings at all through the office of a pre-trial order. (Opinion R. 218). Either course would open a veritable Pandora Box for, to follow either alternative would improperly shift the responsibility for proper pleadings from the advocate to the trial judge; and both alternatives are contrary to presently expressed judicial thinking, for neither the trial court nor opposing counsel is required to sift the wheat from the chaff in an offensive pleading. *McCann v. Clark*, 1951, D.C. Cir., 191 Fed. 2d 476; *Renshaw v. Renshaw*, 1946, D.C. Cir. 1953 Fed. 2d 310.

The mere suggestion that the trial judge should have invoked one or the other of these two alternatives necessarily proceeds upon the postulate that the pleadings failed to meet the requirements of Rule 8, for, had the pleadings complied with the requirements of the Rule it would have been unnecessary for complainants to replead in their own behalf, or for the trial judge to replead for them by way of either alternative suggested by the Court of Appeals. What the Court of Appeals has actually said, therefore, is, that an order by the trial judge to replead, though fully justified and proper when the order therefor was entered, must be set aside and held for naught upon a litigant's adamant refusal to comply with the order and the burden of bringing the pleading into focus with the Rule is shifted from the shoulders of the litigant and his counsel to the shoulders of the trial judge. Such a holding is not only repugnant to every basic concept upon which the Rules of Procedure are predicated, but invites only chaos and confusion in the trial courts, rather than orderly dispatch of the business before them.

This case presents a question which far transcends the involvement of the parties to this suit, for if, by gradual erosion the Courts of Appeals can, by a mere flip of the pen whittle away at the true intent of the Rules—which is to simplify proceedings and facilitate the prompt and orderly dispatch of business in the trial courts—the Rules in the end will become an empty shell, devoid of substance, and the congested dockets of the trial tribunals will stand in cynical mockery to the studied attempt of the Bench and Bar to remedy an unsavory situation, the correction of which is and has been long overdue.

Conclusion

We conclude, therefore, that the judgment of the Court of Appeals remanding this cause for trial on the offensive pleadings should be reversed and the order of dismissal entered by the trial court should be sustained, for, to permit the judgment of the Court of Appeals to stand, would, indeed, create an anomalous situation, for brevity, clarity and conciseness are stressed in and permeate every rule emanating from this Court; and the penalties for infraction are consistently severe. Not only must pleadings in the trial tribunals be "simple, direct and concise", but all briefs and other filings in this Court must be the same. For example Rule 23, par. 4, of this Court provides: "The failure of petitioner to present with *accuracy, brevity and clearness* whatever is essential to a ready and adequate understanding of the points requiring consideration *will be sufficient reason for denying his petition;* while Rule 40, par. 5, in the same vein provides: "Briefs must be compact, logically arranged with proper headings, *concise* and free of *burdensome, irrelevant, immaterial* and scandalous matter. Briefs not complying with this paragraph *may be disregarded and stricken by the Court.*"

It would hardly be consistent for this Court to insist (as it does) upon full, fair, compliance with its own rules requiring brevity, clarity and conciseness, and, yet, deny that right to the trial bench with respect to the very rules that this Court has laid down for their guidance and control.

Wherefore, Petitioner prays that a writ of certiorari issue in this cause, directed to the Court of Appeals for the Fifth Circuit, at New Orleans, and that, upon hearing, in this Court, the judgment of the Court of Appeals be

set aside and a judgment here entered affirming the judgment of the District Court for the Southern District of Texas, Houston Division, the Honorable Ben C. Connally, presiding.

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FELIX A. RAYMER

Certificate of Service

I, Felix A. Raymer, counsel for Petitioner and a member of the Bar of this Court certify that, in accordance with the provisions of Rule 33(1), I did, on this 5th day of July, A. D. 1957, serve opposing counsel with copies of this Petition by depositing same in a United States mail box, with first class postage, prepaid, addressed to Hon. George T. Barrow, Esperson Building, Houston 2, Texas.

ORIGINAL SIGNED

FELIX A. RAYMER

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,918

EDWIN K. ATWOOD, ET AL., *Appellants*,

VERSUS

HUMBLE OIL & REFINING COMPANY, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

(May 17, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

CAMERON, Circuit Judge: This is an appeal from an order entered by the Court below of its own motion dismissing with prejudice appellants' (plaintiffs') complaint

for their failure to bring it into compliance with Rule 8(a), F.R.C.P. In the course of hearing Humble's (defendant, appellee) motion to dismiss for lack of jurisdiction over the person and the subject matter and for failure to join an indispensable party, together with its motion for a more definite statement under Rule 12(e), F.R.C.P., two pre-trial conferences were held. At the second the Court prepared, but did not enter, a pre-trial order defining the issues as it conceived them and requiring each party to take designated steps directed towards simplifying the case and narrowing the issues for trial. Plaintiff's assumed obligation to file an amended complaint under the terms of this order was not, in the judgment of the Trial Court, complied with. The only question we consider here is whether, after formulation of the issues in the pre-trial order, the Court properly dismissed the action with prejudice for plaintiffs' failure to file an amended complaint, which was satisfactory to the trial judge.

Plaintiffs began this action by filing a complaint against Humble Oil seeking, inter alia, enforcement of certain terms of two oil and gas leases or cancellation thereof, recovery of approximately $1,500,000.00 of accrued royalties allegedly held by Humble, the lessee, discovery of certain facts plaintiffs contend were in possession and control of Humble and other related relief.

The original complaint was made up of twenty-three counts occupying forty-six pages of the record, together with seventy-four pages of exhibits made a part thereof. The many theories of recovery advanced by plaintiffs and the relief sought evidently made the complaint appear

to the Trial Court complex and prolix. A careful reading of the complaint reveals, however, that plaintiffs had charted in detail the course they expected to follow in the prosecution of the various claims alleged, and the brief before us sets out and explains plausibly the contents and purposes of each count and paragraph, together with the relationship thereto of the attached exhibits.

Humble's response to this pleading was its motion to dismiss for lack of jurisdiction over the subject matter and person (based chiefly upon the asserted pendency of state court suits), and for failure to join an indispensable party, together with its motion for a more definite statement. At the first conference held May 6, 1955, for consideration of this motion the Court expressed its opinion verbally that plaintiffs' complaint did not comply with Rule 8(a), and that they should file an amended complaint which would comply with the Rule. A second pre-trial conference, called at plaintiffs instance, was held September 1, 1955, after which the Court informed the parties by letter that it had prepared a pre-trial order to carry into effect the results of the conference, and which, in the opinion of the Court, "accurately reflected the theories" under which plaintiffs desired to proceed in prosecuting the suit. The proposed order was forwarded to the parties for their approval, or for written reasons for any disapproval.

In this proposed order, the Court reduced to seven and defined the categories of relief it conceived plaintiffs to be seeking, based upon the complaint and oral statements made by the attorneys. It reiterated that "counsel for plaintiff were reminded . . . that the Court had [all

along] . . . entertained the view that the plaintiffs' complaint did not comply with Rule 8 in that it failed to set out by a short and plain statement the claims which the plaintiffs asserted, and the relief which they demanded . . ." It required Humble to furnish plaintiffs certain information whose discovery was sought in the complaint, upon receipt of which the Court understood plaintiffs would eliminate certain portions of the complaint; and it instructed plaintiffs to gain access to other facts sought by the complaint through "appropriate Federal Rules of Civil Procedure for discovery." And it ordered plaintiffs to file an amended complaint by September 15th.

Plaintiffs promptly wrote the trial judge making specific objections to the proposed order, and simultaneously filed three additional counts advising the judge that "we have undertaken to state as simply, clearly and concisely as possible the claims of plaintiffs as referred to in your proposed Pre-trial Order." The record contains copies of ensuing letters written to the Court by the parties following which the Court caused the Clerk to advise all counsel that the judge had made "the following notation on the calendar sheet . . .":

> "'The defendant having heretofore, by letter of September 19, 1955, furnished plaintiffs the information requested as a result of pretrial conference, the date within which plaintiffs may file an amended pleading in which to state clearly and concisely the nature of their cause of action and the relief sought, is extended to November 7, 1955. No further extensions will be granted.
>
> "'Clerk will notify counsel.'"

No action having been taken by any party, the Court had the Clerk advise all parties by letter of November 9th as follows:

> "The Honorable Ben C. Connally, Judge, has this date made the following notation on the Calendar Sheet, in the above styled action:
>
> "Counsel for plaintiffs having failed to amend his pleading herein to comply with Rule 8(a) requiring a clear, plain and concise statement of the nature of plaintiffs' cause of action and the relief sought, despite repeated orders of this Court to that effect and continued extensions of the period of time within which counsel was permitted to do so, the action is dismissed of the Court's own motion.
>
> "Clerk will notify counsel. Counsel for defendand will present order to this effect within five days."

Humble furnished an order drawn in line with the Court's ruling[1] which was duly entered and plaintiffs' motion to set it aside was denied. We do not think the Court was justified under the facts outlined to enter this order, which operates as an adjudication upon the merits. Rule 41(b) F.R.C.P.

We find ourselves unable to agree with the thinking of the Court below which led it to conclude early in the

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1 The order recites that the complaint was dismissed also under a rule of local practice providing for a dismissal if plaintiff "shall willfully fail or refuse to make ready the case to be placed on the Trial Calendar." The docket entries of the trial judge along with the whole course of the trial show, however, that the sole dereliction charged against plaintiffs was non-observance of Rule 8 and the decision of the case turns exclusively upon construction of that Rule as applied to the facts contained in the record.

proceedings that the complaint was definitely offensive to Rule 8(a) requiring "a short and plain statement of the claim." The Court did not amplify this conclusion, and we think that no convincing argument can be advanced that the statements in the complaint are not "plain," i.e. that they are not clear and understandable and not free of excessive embellishment. The whole criticism must be, therefore, that the complaint was not sufficiently "short,"—that the averments were not "simple, concise and direct," Rule 8(d).

Brevity is certainly desirable in order that the time of court and counsel may be conserved and the cost of printing minimized. But such considerations do not rank in importance with the right and the duty of a litigant to present his demands through counsel of his own choosing and in a style and form of expression which represent the attorney's honest effort to present the claims according to his own notions of their merits and their strong and weak points. In the mechanics of getting his client's claim before the court, the attorney is allowed a wide latitude,[2] and the claim is "whatever the plaintiff in good faith declares it to be;"[3] and in the functioning of the judicial process, the role of the advocate ranks in dignity and importance with that of the judge.

The latitude referred to is subject, of course, to the requirement that pleadings must conform to established principles as they are defined in applicable statutes, the Rules of Procedure, and authoritative court decisions con-

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2 Cf. Edwards v. du Pont, 5 Cir., 1950, 183 F. 2d 165, 168, and 71 C.J.S., Pleadings, Par. 6, p. 25.

3 Edwards v. du Pont, supra.

struing them. Normally, in an adversary proceeding the parties can be counted upon to keep their opponents straight and within the boundaries of these requirements.[4] At all events, it was the duty of the Court below to deal with the pleadings, if possible, in such a way "as to do substantial justice"[5] and to enable the parties to bring the merits of their controversy before the fact-finder for decision.

This the Court could have accomplished by measures as well adapted to the end desired and much less drastic than putting the plaintiffs entirely out of court. Was the complaint redundant, repetitious, argumentative, verbose? If so, the offending portions could be stricken. Did it contain scandalous or impertinent matter? These could be eliminated by like procedure. Rule 12(f), F.R.C.P. Humble evidently did not find these offensive elements in the complaint because it moved for amplification of portions of it rather than for abbreviation.

Moreover, the pre-trial procedures so carefully followed by the Court below afforded ample means by which the issues could be simplified and stripped of all phases which the Court did not consider properly within the ambit of the suit. In fact, after extensive pre-trial hear-

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4 Cf. Cool v. International Shoe Co., 8 Cir., 1944, 142 F. 2d 318, 320; Renshaw v. Reashaw, D.C. Cir., 1946, 143 F. 2d 310; McCoy v. Providence Journal Co., 1 Cir., 1951, 190 F. 2d 760, 766, and Sunbeam Corp. v. Payless Drug Stores, D.C. Cal., 1953, 113 F. Supp. 31, 45.

5 Rule 8(f) F.R.C.P., thus construed by the Supreme Court in Maty v. Grasselli Chemical Co., 1938, 303 U.S. 197, 200:

"Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies by the litigants. They should not raise barriers which prevent the achievement of that end."

And see 2 Moore's Federal Practice, 2d Ed., p. 1711.

ings the Court reduced the issues it understood to be embraced within the complaint to seven, which it memorialized by a proposed order occupying but six pages in the record. Rule 16 F.R.C.P. empowered the Court to enter this order or one like it with such effect as would have controlled "the subsequent course of the action."[6] But the Court did not enter the order it had so carefully worked out and did not pass specifically upon the objections plaintiffs addressed in writing to the order as drawn and did not specify wherein the additional counts they submitted failed to meet the Court's views.

The pleadings, the orders of the Court, and the arguments reflect that the issues involved in this case are many and varied, the amount of money sought is a very large one, the leases involved are long and complicated, and various phases of the cases have been and are being litigated in other courts, and at best a complaint of some

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[6] And see 3 Moore's Federal Practice, 2d Ed., Par. 16.1 and 16.19, pp. 1127-28; and Fowler v. Crown Zellerbach Corp., 9 Cir., 1947, 163 F. 2d 773; Ringling Bros.-Barnum & Bailey Combined Shows v. Olvera, 9 Cir., 1941, 119 F. 2d 583; Owen v. Schwartz, D.C. Cir., 1949, 177 F. 2d 641, 644; Fernandez v. United Food Co., 2 Cir., 1952, 200 F. 2d 414; Sinclair Refining Co. v. Howell, 5 Cir., 1955, 222 F. 2d 637; and Walker v. West Coast Fast Freight, Inc., 9 Cir., 1956, 233 F. 2d 939.

Other pertinent language from Moore's Federal Practice, Par. 16.19, pp. 1127-8 provides: "While Rule 16 does not in terms provide that the pre-trial order supersedes the pleadings, and indicates that at times it will not, nevertheless in practice the order sometimes has that effect." Cf. Curto v. International Longshoremen's and Warehousemen's Union, D.C. Ore., 1952, 107 F. Supp. 805, 809.

Cf., also, the statement from Moore, Par. 16.12, p. 1118: "Since the pre-trial order controls the future course of the action, however, failure to amend the pleadings to reflect the issues stated in the order should be immaterial." Citing Low v. Davidson Mfg. Co., 1940, 7 Cir., 113 F. 2d 361. The pre-trial order achieved this result in Owen v. Schwartz, **supra.**

length would be required to get all of the contentions presented by such a situation before the Court:[7] "What is a 'short and plain' statement depends of course on the circumstances of the case." 2 Moore's Federal Practice, 2d Ed., p. 1652. There may be cases in which mere verbosity or repetition would justify final dismissal by a trial court, but this is not, in our opinion, such a case. For a trial in conformity with the views here expressed, the order of the Court below is set aside and the cause remanded.

REVERSED AND REMANDED.

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[7] We do not pass on the Court's order that plaintiffs proceed under the discovery provisions of the Rules rather than by their complaint to bring before the Court facts alleged to be peculiarly within defendant's knowledge. The Court can, by interlocutory orders, deal with this phase of the problem.

A true copy
Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

APPENDIX "B"

Judgment

Extract from the Minutes of May 17, 1957

EDWIN K. ATWOOD, ET AL.,

No. 15918 versus

HUMBLE OIL & REFINING COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a trial in conformity with views expressed in the opinion of this Court;

It is further ordered and adjudged that the appellee, Humble Oil & Refining Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.